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Supreme Court of the United States

October Term, 1958

No. 428

ERICH W. BERENDSON,

Petitioner,

against

REDERIAKTIEBOLAGET VOLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT REDERIAKTIEBOLAGET VOLO IN OPPOSITION

JAMES M. ESTABROOK,
DAVID P. H. WATSON,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

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Opinions Below

The memorandum opinion of the United States District Court for the Southern District of New York, dated October 26, 1956 is reported at 149 F. Supp. 140 and is set forth at pages 2a-3a of libellant-appellant's Appendix in the Court of Appeals.*

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is reported at 257 F. 2nd 136 and is set forth on pages 23-26 of the Appendix to the Petition.

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* Pages designated as "a" refer to pages in libellant-appellant's Appendix in the Court of Appeals; and pages designated as "b" refer to pages in respondent's Appendix in the same Court.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

The Statutes Involved

The only United States statute alleged by the petitioner is the Jones Act, 46 U. S. Code § 688, enacted as Section 33 of the Merchant Marine Act of June 5, 1920. Both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit have held that the Jones Act has no applicability to this suit.

The following statutes of the Kingdom of Sweden, which formed the basis for the affidavit of the Consul General of Sweden in New York (17b-19b), are involved:

1. Section 34 of the Royal Ordinance of June 9, 1939. (Covering the hiring abroad of crews of Swedish vessels before Swedish Consuls.)
2. Section 1 of Article 47 of the Royal Ordinance of June 9, 1939. (Providing that all crews aboard Swedish vessels shall serve subject to the Swedish law.)
3. Section 11 of Chapter 11 of the Merchant Seaman Law of June 15, 1922. (Providing that the shipping and discharge of seamen on Swedish vessels shall be subject to Swedish law.)
4. Accident Insurance Act of June 17, 1916. (Making shipowners liable to seamen on Swedish ships for injuries without fault on principles of workmen's compensation and requiring Swedish shipowners to insure their liability to crews of their vessels.)

Questions Presented

1. Whether the Jones Act (46 U. S. Code § 688) is applicable to a suit by an Estonian seaman against the owners of a Swedish vessel based on an injury sustained aboard the vessel while in waters beyond the territorial limits of the United States.

2. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the District Judge had not abused his discretion when he declined to retain jurisdiction of the personal injury suit between a non-resident alien seaman of Estonian nationality and the Swedish owner of the Swedish vessel aboard which the seaman alleges he was injured on the high seas.

Statement

The facts upon which the District Court based its memorandum decision and the facts before the United States Court of Appeals for the Second Circuit as well as those presently before this Court are contained in the libel, in the affidavits filed in support of respondent's motion in the District Court and the affidavits filed in the District Court by libelant and his proctor in opposition to that motion.

At the time of the matters alleged in the libel petitioner was an Estonian citizen (17b) and a member of the crew of the Swedish vessel m/v Dalhem (2b), a vessel owned by the Swedish respondent (1b).

Petitioner signed articles in Houston, Texas, in October, 1952, to serve aboard m/v Dalhem as a member of the crew (26b, 29b). On or about March 27, 1953, while m/v Dalhem was outside the territorial waters of the United States and off the Northern Coast of Cuba (8b, 14b), libelant was injured (2b). One hour after the injury the vessel arrived at the port of Nuevitas, Cuba, and libelant

was placed ashore for hospital and medical treatment in Havana, Cuba (9b). Hospital and medical bills were all paid by respondent.

On June 24, 1953 petitioner rejoined the vessel in Havana and proceeded to Sweden aboard her (9b, 26b). While in Sweden petitioner received further medical treatment and was declared fit for duty by a Swedish physician on August 10, 1953 (9b, 26b). On that same day he rejoined m/v Dalhem as a member of the crew and remained aboard that vessel sailing in various international waters until he deserted the vessel in Great Britain on February 10, 1954 (9b, 27b). According to petitioner's affidavit in opposition to the motion in the District Court he returned by ship to the United States in October, 1955, after serving on several other vessels (27b, 29b).

In the libel, libelant asserted causes of action both under the Jones Act (46 U. S. Code § 688) and under the general and admiralty law of the United States (2b).

By notice of motion, dated May 31, 1956, respondent moved for an order of the District Court declining to retain jurisdiction of the cause of action set forth in the libel on the grounds that it was a suit between foreigners arising out of an alleged personal injury occurring on waters outside the territorial limits of the United States (5b-19b).

In the affidavit submitted in support of that motion it was stated that petitioner could not recover under the Jones Act (11b), and it was urged that since the rights of the petitioner were governed by Swedish law, and since petitioner had a remedy available to him through the Swedish Consulate General in New York, the Court should decline jurisdiction of the cause of action in its discretion (12b).

Annexed to respondent's motion was the affidavit of the Consul General of Sweden in New York in which the

Consul General stated that under the Swedish law service aboard a Swedish vessel must be subject to the terms and conditions laid down in the Swedish Merchant Seamen's law and that pursuant to that law a Maritime Declaration was held on board m/v Dalhem in Boston on April 21, 1953, by the Swedish Consul in Boston, consisting of a hearing of all persons who could give information relating to the injury sustained by the libelant (17b-19b).

It was also stated in that affidavit that under the Accident Insurance Act of June 17, 1916, a Swedish shipowner is required to take out insurance in order that compensation may be provided to seamen aboard Swedish vessels for the result of accidents occurring during the course of their employment. The affidavit of the Consul General also stated that a seaman injured aboard a Swedish vessel had a full and complete right to compensation from the insurance fund of a governmental agency or of a private mutual company especially founded for that purpose and authorized to carry out such insurance by the Royal Swedish Government. Finally, the affidavit of the Consul General stated that it was not necessary for a seaman injured aboard a Swedish vessel to return to Sweden in order to procure such compensation, but his application could be entertained by any Consul or Vice-Consul of Sweden and hearings would thereupon be held at the consulate and arrangements made through the consulate for the payment of such amounts as the seamen might be found entitled to under the laws of Sweden.

In ruling upon the motion District Judge Ryan held that the law of the flag of the vessel, the Swedish law, would apply in determining the rights of the parties and that the Jones Act was not applicable (2a). Judge Ryan also held in his memorandum that he could see no reason for the Court to retain jurisdiction, since the extent of the libelant's recovery was to be determined and fixed by Swedish law which could be better applied by the Swedish Consul (3a).

The petitioner appealed to the United States Court of Appeals for the Second Circuit urging first, that Judge Ryan had erred in holding the Jones Act inapplicable and second, that Judge Ryan had abused his discretion in declining to retain jurisdiction of the suit.

In an opinion, dated July 11, 1958, Circuit Judge Swan, writing for an unanimous court, affirmed the judgment of the District Court dismissing the libel, holding that the Jones Act was inapplicable and that the petitioner's contention that the District Judge had abused his discretion was not supportable (pp. 23-26 of Petition).

ARGUMENT

POINT I

The Jones Act does not afford a substantive right to the petitioner against the respondent and does not constitute a basis for retention of jurisdiction by the District Court over the petitioner's suit.

In the Petition, it is argued that the Jones Act, 46 U. S. Code § 688, is applicable to the suit despite the decision of this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), and upon the affirmative authority of a series of cases all of which were decided by the United States Court of Appeals for the Second Circuit prior to this Court's decision in *Lauritzen* v. *Larsen, supra*.

We submit that this Court's decision in *Lauritzen* v. *Larsen, supra*, is controlling and has so altered the criteria for deciding whether the Jones Act applies in a foreign vessel and foreign seaman case that the earlier decisions upon which petitioner relies have been substantially affected.

The earliest case to which reference is made in the Petition is *The Paula*, 91 F. 2d 1001 (2 C. A. 1937), cert. den.

302 U. S. 750 (1937), in which the Court of Appeals affirmed a District Court decree dismissing an action by a German seaman against the owners of a Danish vessel on which he was serving. The German seaman had signed articles in South America and was injured aboard the vessel while it was in a port in Florida. Circuit Judge Swan, who wrote the opinion in the instant matter, held at page 1004 that rights under the Jones Act were not to be extended to this alien seaman since he had signed articles abroad to serve on a foreign vessel.

The United States Court of Appeals for the Second Circuit next considered the problems in *Gambera* v. *Bergoty*, 132 F. 2d 414 (2 C. A. 1942), cert. den. 319 U. S. 742 (1943). In that case the Court held that the Jones Act was to be applied, since the foreign-born libelant had been domiciled in the United States for over 20 years, since the voyage began and ended in the United States, since the place of signon was a United States port and since the injury occurred in United States waters as well. Furthermore, no practical remedy was available to libelant under the law of the flag, since Greece was under enemy occupation.

In *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (2 C. A. 1945), the United States Court of Appeals held that the Jones Act was applicable to a situation in which the alien seaman signed on a foreign vessel in an American port and was injured in an American port as well. Here again, the law of the flag, Greece, was of little assistance because of enemy occupation.

In *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597 (2 C. A. 1950), cert. den. 341 U. S. 915 (1951) *sub. nom. Atlantic Maritime Co. et al.* v. *Rankin*, the alien seaman signed on in a United States port, but was injured on the high seas. Judge Learned Hand, writing for the Court, held that the Jones Act was applicable and stated the general proposition that the Jones Act imposed its terms upon "all owners who sign on crews in an American port" (179 F. 2d 600).

There is no question but that following the *Taylor* v. *Atlantic Maritime Co.* decision the sole criterion being applied to determine the applicability or nonapplicability of the Jones Act was the place of sign-on. This was confirmed by the extremely brief decision of the United States Court of Appeals in disposing of the appeal in *Lauritzen* v. *Larsen*, 196 F. 2d 220 (2 C. A. 1952). Larsen was a Danish seaman who, having signed articles in New York for service aboard a Danish vessel, was injured aboard that vessel while in the port of Havana, Cuba. The District Court ruled that the Jones Act was to be applied. The Court of Appeals affirmed in a three line opinion which did no more than affirm on the basis of the decisions of the same Court in the *Kyriakos* and *Taylor* cases. By that time there was no question at all but that the basis for the decision was the fact that Larsen had signed articles in a United States port. All other matters were irrelevant. This Court, of course, did not agree with that approach, as will be pointed out later.

Before leaving the *Taylor* case, however, it is interesting to note that counsel makes no mention in his Petition of the fact that a later decision in that case was forthcoming on December 8, 1953, *sub nom. Rankin* v. *Atlantic Maritime Co.*, 117 F. Supp. 253 (S. D. N. Y. 1953). After this Court handed down the *Lauritzen* v. *Larsen* opinion on May 25, 1953, counsel for Atlantic Maritime Co. sought and obtained an order of the District Court granting him leave to file a further motion. Counsel for Atlantic Maritime Co. then moved in the District Court seeking a dismissal of the Jones Act phase of the action on the basis of this Court's decision in *Lauritzen* v. *Larsen, supra.* The District Judge then held that the Jones Act cause of action would have to be dismissed. In other words, the final decision as to the applicability of the Jones Act in *Taylor* v. *Atlantic Maritime Co., supra,* holds *against* this petitioner and not in favor of him as the Petition would indicate. We called this same lack of candor as to the final holding of the *Taylor*

case to the attention of the United States Court of Appeals in our brief on behalf of respondent filed in that Court. It will be noted that the opinion of Circuit Judge Swan (p. 25 of the Petition) refers to the final *Rankin* v. *Atlantic Maritime Co.* decision as being against petitioner's contentions. For some reason counsel for petitioner stubbornly chooses not to vary from his earlier position. Perhaps this is due to the fact that the physical format of the Petition presently before this Court is taken for the most part without alteration from the brief which was submitted on behalf of petitioner in the United States Court of Appeals for the Second Circuit. It will be noted that throughout the Petition reference is made to "this Court" while in fact meaning the United States Court of Appeals for the Second Circuit and not the Supreme Court of the United States. The bulk of the Petition has been lifted bodily from the earlier brief without change of words or approach. Nothing new has been presented, and every argument in the Petition has already been rejected by the United States Court of Appeals.

The decision of this Court in *J. Lauritzen* v. *Larson, supra,* is relevant to the instant suit, and under that decision it is apparent that the Jones Act does not apply.

In writing the *Lauritzen* opinion Mr. Justice Jackson considered the seven elements, which he stated were generally conceded to influence choice of law to govern a maritime tort claim. A comparison of these seven factors in the *Larsen* case and in the instant suit discloses no significant variation.

1. The first factor, Place of the Wrongful Act, is on all fours with the facts in the *Lauritzen* case. Neither Larsen nor this petitioner were injured in territorial waters of the United States. The former was injured aboard his vessel in the port of Havana, Cuba. The latter was injured on the high seas just off the coast of Cuba.

2. With respect to the second factor, Law of the Flag, Mr. Justice Jackson held at 345 U. S. 584-6 that the great-

est weight was to be given to the law of the flag and that the law of the flag was to prevail against American law unless "some heavy counter-weight appears." In the *Lauritzen* case the flag of the vessel was Danish and Danish law was held to be applicable. The vessel here involved is a Swedish vessel flying the Swedish flag and registered out of Sweden. The Swedish law should apply.

3. The third factor considered by Mr. Justice Jackson was Allegiance or Domicile of the Injured and it is here, perhaps, that a slight variation between the two cases exists. Both parties in the *Lauritzen* case, the seaman and the shipowner, were Danish. This petitioner is Estonian and the vessel aboard which he was sailing was Swedish. We submit, however, that the Jones Act was not intended by Congress to be applied whenever there appeared to be a diversity of citizenship between the nationality of the seaman and the nationality of the owners of the vessel. It would be ridiculous to hold that absent other factors the Jones Act should be applied to any employer-employee relationship where both were aliens, but were of different nationalities. Reference to Mr. Justice Jackson's comments at 345 U. S. 586-7 on this factor indicates that such a dissimilarity of nationality would have made no difference in his conclusion.

Throughout the Petition petitioner has been characterized as a "permanent alien resident" of the United States, and on the basis of that characterization counsel for petitioner urges that the District Court should have held the Jones Act applicable. We submit that even *if* petitioner were a permanent inhabitant or domiciliary of foreign citizenship, who was injured aboard a foreign vessel on the high seas, that residence factor alone would not require application of the Jones Act and would not outweigh the other factors which cry for application of the law of the flag.

The fact is, however, that the characterization of the petitioner in the Petition is not accurate. In his memoran-

dum opinion of October 26, 1956 District Judge Ryan stated that the petitioner was "an Estonian citizen, living between voyages in New York at a seaman's club" (2a). In his opinion affirming the dismissal Circuit Judge Swan disposed of this argument in the following words (p. 25 of the Petition):

> "Also unsound is the argument that *Lauritzen* is distinguishable because libelant had a 'sufficient national interest' to bring him 'within the broad purview of the statutory law of the United States' by reason of the fact that between voyages he lived at a seaman's club in New York City. His presence here was never more than transitory; he never entered the United States except as a seaman and could not legally remain ashore more than 29 days between voyages."

We submit that the words of Mr. Justice Jackson are directly in point when in referring to the seaman in the *Lauritzen* case, he wrote.

> "His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another" (345 U. S. 587).

Certainly the presence of this petitioner in New York, temporary as it appears to be, creates no such national interest in him or a duty towards him such as to justify the intervention of American law aboard this Swedish vessel.

4. With respect to the fourth item, Allegiance of Defendant Shipowner Mr. Justice Jackson held that Danish law was applicable, since the vessel and the defendant shipowner were both Danish. In the instant suit the respondent is Swedish and the vessel, m/v Dalhem, is a Swedish flag vessel duly registered out of the Kingdom of Sweden as supported by the affidavit of the Consul General of Sweden in New York (17b-19b).

5. The fifth factor considered in the *Lauritzen* case was the Place of Contract. After stating at 345 U. S. 588 that

the place of sign-on in most instances was "fortuitous" and that "a seaman takes his employment, like his fun, where he finds it", Mr. Justice Jackson wrote at page 589:

> "We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort".

The American sign-on in the instant suit should be given no more weight than was the American sign-on in the *Lauritzen* case.

6. The sixth factor considered by this Court was Inaccessibility of Foreign Forum, and here again the facts are similar. In the *Lauritzen* case Mr. Justice Jackson pointed out that a forum was available to Larsen through the Danish Consulate, and that it was not necessary for him to return to Denmark in order to process his claim. In the instant suit the affidavit of the Consul General of Sweden in New York (17b-19b) makes it clear that a return to Sweden is not necessary in order that this petitioner may obtain relief under the pertinent Swedish statutes.

7. The seventh and last factor considered by Justice Jackson was the law of the Forum. This factor was eliminated as non-determinative at 345 U. S. 591 in the following terms:

> "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

It is submitted that, based upon the reasons set forth by this Court in *J. Lauritzen* v. *Larsen, supra*, all seven factors considered would call for a conclusion that, as in the *Lauritzen* case, the law of the flag of the vessel must apply.

The authorities cited in the Petition are outdated and no longer valid in that they had been predicated upon the now rejected theory that cardinal importance was to be given to the place of sign-on.

The rulings of the two courts below in the instant matter are consistent with this Court's holding in *Lauritzen* v. *Larsen, supra*, in disposing of the Jones Act cause of action.

POINT II

The District Judge did not abuse his discretion in declining to retain jurisdiction of the libel.

Apparently there is no argument between counsel for petitioner and counsel for respondent with respect to the statement that the question involved is whether the District Court should have retained jurisdiction of the suit, not whether the District Court had jurisdiction originally.

There is no question but that the power to entertain the libel existed in the District Court. We urge, however, that Judge Ryan's decision to decline to retain jurisdiction, arising out of a motion addressed towards that relief, was sound and evidenced no abuse of his judicial discretion.

Since counsel for petitioner cites the case, we assume that he agrees with the holding of this Court in *Canada Malting Co.* v. *Paterson*, 285 U. S. 413 (1932), where Mr. Justice Brandeis wrote as follows at page 421:

> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions of the lower Federal Courts [citations]. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences [citations], or to claims of personal injury [citations]."

> "Obviously, the proposition that a Court having jurisdiction must exercise it, is not universally true; else the Admiralty Court could never decline jurisdiction on the ground that the litigation is between foreigners."

We also agree with counsel for petitioner when he cites the *Belgenland*, 114 U. S. 355 (1885), for the proposition that, in an admiralty suit between foreigners, the question is not whether jurisdiction exists, but only whether it should or should not be exercised by the District Court.

The question of abuse or non-abuse of judicial discretion in a case such as this hardly lends itself to formula appraisal, and each case must, as a rule, stand on its own facts and on its own merits. For those reasons we feel that the authorities cited in petitioner's brief are distinguishable, since all of them are predicated upon their own peculiar facts, although perhaps decided on the basis of the same general principles.

We urge, however, that the case of *Koziol* v. *The Fyigia*, 230 F. 2d 651 (2 C. A. 1956), cert. den. 352 U. S. 827 (1956), is so closely in point on the facts and on the results that it should be called to the attention of this Court. Koziol was a seaman of Polish nationality who was serving aboard the m/s Fylgia, a Swedish vessel, and who claimed that he had been injured aboard that vessel while on the high seas. He sued in admiralty in the United States District Court for the Southern District of New York as did this petitioner. Respondent in that suit moved for an order of the District Court declining to retain jurisdiction. In an opinion granting the motion, not officially reported, but unofficially reported at 1953 A. M. C. 220, District Judge Clancy held that the rights of Koziol as against the Swedish owners were to be determined under the Swedish law, and that he would decline to retain jurisdiction, since the affidavit submitted in support of the motion included an affidavit from the Swedish Consul in New York stating that

Koziol's claims could be presented through that body. The United States Court of Appeals for the Second Circuit, in an unanimous opinion, affirmed, stating:

> "And there is no ground for holding the Trial Judge in error in his conclusion that, since the Swedish law so directly controls, the libelant's rights would be adequately, if not better adjudicated in Swedish tribunals."

Between the dismissal of the original District Court action referred to above and the affirmance by the Court of Appeals, a second libel had been filed in the Southern District Court on behalf of Koziol. In declining to retain jurisdiction of that second libel District Judge Clancy wrote, as unofficially reported at 1956 A. M. C. 719:

> "Indeed, the fact is established that the libelant has a right under Swedish law which he can assert here."

The affidavit of the Swedish Consulate General in the instant matter (17b-19b) sets forth the provisions of the Swedish law relating to the coverage on a compensation basis to which seamen serving aboard Swedish vessels are entitled. It is respectfully submitted that the Swedish Consulate in New York is fully competent to administer the appropriate provisions of the Swedish law relating to the rights of this petitioner under that law.

An interesting if not astonishing sidelight on this phase of the Petition is that while counsel for petitioner writes in the Petition that the rights and remedies of this petitioner through the Swedish Consulate are fictions and empty promises, the petitioner himself is now actively engaged in filing and presenting his claim through the very Swedish Consulate General about which his counsel makes so many derogatory remarks. Since the decision of the Court of Appeals on July 11, 1958, the petitioner has been in frequent communication with the Consulate, and at this

very moment the Consul General is awaiting receipt of further information from the petitioner relating to petitioner's employment since the injury of March 1953 in order that there may be some substantiation for his claim of disability. We can only suggest that petitioner and his counsel have failed to coordinate their activities. Certainly the actions of the petitioner are not reflective of the arguments of his counsel.

On page 3 of the Petition counsel argues that there is a conflict between the decision of the United States Court of Appeals for the Second Circuit in the instant matter and the decision of the United States Court of Appeals for the Fourth Circuit in *Fletero* v. *Arias*, 206 F. 2d 267 (4 C. A. 1953) cert. den. 346 U. S. 897 (1953). We submit that the case is clearly distinguishable. That case involved a suit in admiralty filed by an Argentinian seaman against an Argentinian vessel and the Argentinian owners. Not only did the injuries occur while the vessel was moored to the dock in Norfolk, Virginia, but libelant was also claiming for unpaid wages and waiting time under 46 U. S. Code § 596. This wage claim statute applies to foreign vessels while they are in United States ports. The constitutionality of that provision as applied to foreign vessels and foreign seamen was supported by the decision of this Court in *Strathearn Steamship Company* v. *Dillon*, 252 U. S. 348 (1919). Since a claim was made under that wage statute the District Court was *required* to retain jurisdiction of at least that cause of action of the libel and in the interest of economy of justice undertook to entertain the claim as well for injuries sustained in United States waters. In the instant matter, of course, no such claim has been made under the wage statutes, and the District Court was not required to retain jurisdiction under any of the allegations contained in the libel. Chief Judge Parker in the *Fletero* case also justified the retention of jurisdiction by the District Judge on the grounds that libelant's injury occurred

while the ship was tied up in Norfolk, that a survey of the vessel had been made in Norfolk, and that the libelant was hospitalized in Norfolk, thereby making the medical proof immediately available as well. None of these factors are present in the instant Petition. There is no connection whatsoever between the matters set forth in this libel and the fact that suit was instituted in the District Court in New York. The injury was sustained on the high seas. The libelant was treated in Havana, Cuba, and in Sweden. None of the witnesses are located in New York. Most important, however, is the fact that the wage claim is what prompted the Court in the *Fletero* case to retain jurisdiction. As stated by Chief Judge Parker at 206 F. 2d 271:

> "The fact that the court must assume jurisdiction of the claim arising under the statutes of the United States is a circumstance which it may properly consider in deciding whether it will assume jurisdiction of the claim for damages so that the libelant may be awarded complete relief against the vessel in one suit".

There is no conflict at all between the instant matter and *Fletero* v. *Arias, supra.* The conclusion in the latter case is different because the claims and the facts were different.

Other authorities cited in the Petition on the question of discretionary jurisdiction and the abuse thereof are clearly distinguishable as well.

In *Gonzales* v. *D/S Dania A/S*, 108 F. Supp. 908 (S. D. N. Y. 1952), the District Judge exercised his judicial discretion and retained jurisdiction of the suit between the Spanish seaman and the Danish vessel only because there had been no showing of the existence of any remedies under the laws of Denmark and no showing that any relief could be had through the local Danish Consulate General.

Heredia v. *Davies*, 12 F. 2d 500 (4 C. A. 1926), involved an appeal by the shipowner after a trial on the merits. The shipowner claimed that the District Court should not have assumed or retained jurisdiction of the causes of action. Judge Parker affirmed the assumption of jurisdiction by the District Court and pointed out that the injuries had been sustained aboard the vessel while she was "at the dock in New York City" and then ruled, rightly or wrongly, that the District Judge was correct in holding, that the rights of the parties were to be determined by the law of the United States as the *lex loci delicti* (12 F. 2d 501). This same argument could not, of course, be used in the instant suit since this petitioner was injured on the high seas and the law of Sweden, the law of the flag, and not the law of the United States would be the *lex loci delicti*.

Barkas v. *s/s Vassilis*, 126 F. Supp. 532 (S. D. N. Y. 1955), referred to on page 16 of the Petition involved a libel by members of the crew of a Panamanian vessel against another Panamanian vessel for salvage services rendered. In rejecting a motion to have the Court decline to retain jurisdiction of the suit the District Judge held that a salvage claim was one arising under the law of nations and the District Court would take jurisdiction unless special grounds were shown why it should not. This petitioner has no cause of action under the law of nations and none is urged in the libel. Rather his cause of action falls within the Swedish law, and if this District Court had retained jurisdiction of the suit it would have found itself immersed in the substantive provisions of Swedish law.

Nor is *Cruz* v. *Herkna et al.*, 125 F. Supp. 288 (S. D. N. Y. 1954) in point. District Judge Conger there held that he would retain jurisdiction under the general maritime law, since it was apparent that the Portuguese libelant would have to proceed to Honduras in order to present his claim. Judge Conger rightly felt that this would be

an undue hardship, especially since the Portuguese libelant was about to be deported to Portugal. No such factors are present in the instant Petition, since it has been demonstrated that this petitioner can proceed to press his claims under the Swedish law without having to proceed to Sweden. The fact that such a procedure is presently being followed by the petitioner himself through the Swedish Consulate General in New York is perhaps the best proof of that.

We submit that there is not the slightest evidence of abuse of discretion on the part of District Judge Ryan when he held that:

> "There is no reason for this Court's retaining jurisdiction since the extent of libelant's recovery is determined and fixed by Swedish law which can adequately if not better be applied by the Swedish Consul (*Koziol* v. *Stockholms, supra*), and since there is a convenient forum available to libelant capable of fairly adjudicating his rights."

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

James M. Estabrook,
David P. H. Watson,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.